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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

WALLACE C. YOST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Wallace C. Yost objected to the United States District Court of the Northern District of Florida conducting an entirely new sentencing, with changed findings of fact and conclusions of law, when it was merely required to correct a single sentencing error. Three days after sentence was pronounced in open court, the district court resentenced petitioner, ostensibly because of an error it had made in applying one of the United States Sentencing Guidelines and the court below gave the green light to that practice. It held that, upon discovery of a clear error, a sentencing court has the authority to conduct a new sentencing, notwithstanding the plain language of Fed. R. Crim. P. 35(c) and the explanation of the rule's contemplated operation contained in the Advisory Committee Notes (1991 Amendment) to the rule. The question presented here is:

Does Fed. R. Crim. P. 35(c) authorize a court to conduct an entirely new sentencing and resentence a defendant by altering findings of fact and conclusions of law on issues previously resolved when correcting an arithmetical, technical or other clear error?

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PETITION FOR WRIT OF CERTIORARI

Wallace C. Yost respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on October 14, 1999, in order to maintain uniformity in the application of an important Federal Rule of Criminal Procedure and to preserve the plenary rulemaking authority of the Court.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit that gives rise to this petition is reported at 185 F.3d 1178 (11th Cir. 1999), and is reprinted in Appendix A hereto ("App. A") at page 1a. By order entered October 14, 1999, the Eleventh Circuit denied the petition for rehearing and petition for rehearing en banc. App. B, 9a.

JURISDICTION

Following sentencing, petitioner timely appealed to the Eleventh Circuit, which affirmed the sentence in an opinion filed on August 11, 1999. On October 14, 1999, the court below denied the timely filed petition for rehearing and petition for rehearing en banc. Pursuant to Supreme Court Rule 13.3, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED IN THIS CASE

28 U.S.C. § 2072(a) (Appendix C) and Federal Rule of Criminal Procedure 35(c) (Appendix D).

STATEMENT OF THE CASE

Petitioner entered a plea of guilty to two counts of a four count indictment returned in the United States District Court for the Northern District of Florida. The offenses of conviction were one count of conspiracy to commit mail fraud, wire fraud, and bankruptcy fraud, in violation of 18 U.S.C. § 371, as well as a single count of the substantive offense of mail fraud, in violation of 18 U.S.C. §§ 1341 and 2.

Sentencing was first held on March 24, 1998. Following protracted discussion and its analysis of the law and the offenses involved, the district court determined that the appropriate offense level under the United States Sentencing Guidelines was 17, mandating a guideline range of punishment of 24 to 30 months of incarceration. The district court granted the government's motion for downward departure filed in accordance with U.S.S.G. § 5K1.1 and sentenced petitioner to a term of 14 months imprisonment on both counts. The court ordered that the terms of imprisonment be served concurrently, ordered that petitioner pay a fine in the amount of $10,000.00 and

ordered restitution in the amount of $50,000.00. Even though sentence was pronounced, this was not the end of petitioner's sentencing.

Three days later, the district court again had petitioner appear for sentencing. This "new" sentencing took place the day following the sentencing hearing for petitioner's codefendant.[1] At the second sentencing proceeding the district court vacated the original sentence, reversed its factual findings and legal conclusions concerning bank fraud as relevant conduct for sentencing purposes under U.S.S.G. § 1B1.3, sentenced petitioner to a term of imprisonment of 18 months, a term matching that of the codefendant, and increased the restitution amount payable by petitioner by $1,000,000.00.

At petitioner's original sentencing, much time was spent determining what would be the conduct relevant to be considered for sentencing purposes. The determination was wholly dependant upon the application of the meaning and scope of *United States v. Mueller*, 74 F.3d 1152 (11th Cir. 1996). After protracted discussion and argument the district court found and concluded that *Mueller* was applicable to the facts of petitioner's case and that his action in giving less than complete information in the course of a discovery deposition conducted

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[1] Petitioner's codefendant went to trial and was convicted by the jury of all counts with which he was charged. At the sentencing of Mr. Fleming (the codefendant) the district court observed " . . . it troubles me that Mr. Yost [petitioner herein], unless I do depart for Mr. Fleming, Mr. Yost is ending up with a sentence below what Mr. Fleming is to receive. That troubles me."

pursuant to corporate bankruptcy proceedings did not constitute bank fraud. The bank fraud theory advanced by the government was that petitioner's evasive and incomplete answers frustrated federally chartered institutions' efforts at collecting on judgments it held against several of petitioner's corporations. The district court correctly observed that petitioner had never filed for bankruptcy and the various assets which were at issue in the bankruptcy deposition " . . . were not subject to any liens or security interests that were recorded and were not generally subject to the Bankruptcy Court at all." At the original sentencing the district court rejected the various theories of the government that petitioner's conduct in the context of corporate bankruptcy proceedings constituted bank fraud and determined that petitioner's culpability for bank fraud turned on one issue:

> So I narrow it down to really the only thing that's left and that is the deposition of Mr. Yost in the avoidance of the creditors' efforts to execute on their judgments and collect by testifying falsely, and is that within *Mueller*? That's really the narrow issue here. Is that enough to fall within *Mueller* or is it outside *Mueller*? And as I have already said, in the absence of *Mueller* there would be no doubt that kind of conduct would, in my judgment, fall within Part 1 of the bankruptcy fraud statute, in 1344, which is very broad and is generally being construed broad. But in light of *Mueller*, it certainly casts everything in doubt. So – so that's where we are. But I am constrained to follow *Mueller*. And strictly applying *Mueller* to the facts of this case in the civil litigation process, it seems to me that what Mr. Yost did was part of a civil litigation process

> and outside of the bank fraud statute, according to the Eleventh Circuit. So, therefore, I am gonna [sic] have to sustain the objection on the basis of *Mueller.*

The sentencing court made some troubling observations in the course of the codefendant's sentencing hearing which demonstrated that the court was distressed that the codefendant was being sentenced to a greater term of imprisonment than was petitioner, stating explicitly that the court " . . . was not comfortable sentencing Mr. Fleming to more than [it] had sentenced Mr. Yost."

While the district court realized it had committed a clear error by utilizing the money laundering guidelines, U.S.S.G. § 2S1.1, for sentencing purposes, instead of the generic fraud guidelines, U.S.S.G. § 2F1.1, and could have simply corrected the sentence by applying the correct guideline, the district court went further. It believed that instead of merely being required to apply the correct guideline, Fed. R. Crim. P. 35(c) allowed it to completely resentence petitioner, including revising its findings of fact and conclusions of law with respect to the previously resolved issue of whether petitioner's actions in the course of the corporate bankruptcy proceedings constituted bank fraud.

The Eleventh Circuit condoned the action by the district court in affirming petitioner's sentence. In its view, " . . . it takes only one clear error to give the district court authority under Rule 35(c) to conduct an entire resentencing at which the court may correct any other errors, clear or not." App. A, 8a. The Eleventh Circuit's holding essentially rewrites Rule 35(c) by permitting

imposition of an entirely new sentence when all that is required is a simple correction of an error.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's Opinion Essentially Rewrites Fed. R. Crim. P. 35(c) And Usurps This Court's Plenary Rulemaking Authority

The decision below authorizes any sentencing court to totally revamp a defendant's sentence when it notices a clear error in a sentence that has already been imposed. By thus holding, the Eleventh Circuit eviscerates the admonition that Rule 35(c) is to be used solely to " . . . correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(c). As courts have noted, Rule 35(c) was never intended to afford the court the opportunity "to reconsider the application or interpretation of the sentencing guidelines or of the sentence." *United States v. Demartino*, 112 F.3d 75, 79 (2d Cir. 1997), quoting Fed. R. Crim. P. 35(c) Advisory Committee Note (1991 Amendment); *United States v. Fraley*, 988 F.2d 4 (4th Cir. 1993).

Congress has granted this Court the authority to promulgate rules of procedure for the district courts. *See* 28 U.S.C. § 2072(a). With the promulgation of Rule 35(c) in 1991, the Court carefully circumscribed the situations in which a sentencing court may correct a sentence that has already been imposed.[2]

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[2] The Eleventh Circuit did not deem it necessary to reach the issue of when a sentence is actually imposed. It did,

Before the 1991 amendment which added Rule 35(c), there was some doubt about whether a district court had the authority to alter a sentence except in two circumstances: either after a remand from an appellate court, or in response to a government motion. "Under the literal language of Rule 35 as adopted in 1984, district courts had no authority to modify a sentence either *sua sponte* or upon motion of the defendant." *United States v. Fraley*, 988 F.2d at 6. "On its face, the amended rule authorized the correction of a sentence only on remand . . . and a reduction of a sentence only upon motion by the government 'to reflect a defendant's subsequent, substantial assistance in investigating or prosecuting another person' who has committed an offense." *United States v. Corey*, 999 F.2d 493, 495 (10th Cir. 1992), quoting Fed. R. Crim. P. 35(b). The restrictive nature of former Rule 35 resulted in at least two courts holding that sentencing courts had the inherent power under the sentencing guidelines to reconsider a sentence during the period in which any party was authorized to file notice of appeal, notwithstanding the literal language of the rule. *See United States v. Cook*, 890 F.2d 672 (4th Cir. 1989), and *United States v. Rico*, 902 F.2d 1065 (2d Cir.), *cert. denied*, 498 U.S. 943 (1990). "The

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however, note the split in the circuits between the majority view that a sentence is imposed when orally pronounced, *see United States v. Gonzalez*, 163 F.3d 255, 264 (5th Cir. 1998); *United States v. Layman*, 116 F.3d 105, 108 (4th Cir. 1997), *cert. denied*, ___U.S.___, 118 S.Ct. 1034 (1998); *United States v. Abreu-Cabrera*, 64 F.3d 67, 73-4 (2d Cir. 1995); *United States v. Townsend*, 33 F.3d 1230, 1231 (10th Cir. 1994), and the opposite view that it is imposed when judgment is entered. *United States v. Clay*, 37 F.3d 338, 340 (7th Cir. 1994); *United States v. Morillo*, 8 F.3d 864, 869 n.8 (1st Cir. 1993) (in dicta). App. A, 5a n. 4.

1991 amendment to Rule 35(c) was intended to codify the result reached in *Rico* and *Cook* but requires as well that the sentencing court act *within* the time frame prescribed in the rule." *United States v. Fahm*, 13 F.3d 447, 453-54 (1st Cir. 1994) (emphasis in original). The authority to correct a sentence was not intended to grant to a district court the far-reaching authority to completely resentence a defendant after sentence had been pronounced, even if such action were taken within the seven day window. As the Advisory Committee stated:

> The authority to correct a sentence under this subdivision is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action under Rule 35(a). The subdivision is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence. Nor should it be used to reopen issues previously resolved at the sentencing hearing through the exercise of the court's discretion with regard to the application of the sentencing guidelines.

Fed R. Crim. P. 35(c) Advisory Committee Note (1991 Amendment). In the present case, the district court did not simply correct the sentence by applying the correct guideline, it completely resentenced petitioner. That resentencing was not the "result of arithmetical, technical, or other clear error", but instead was the result of the court's view of petitioner's sentence which crystallized after the court had sentenced his codefendant.

The district court was clearly disturbed at the prospect of the codefendant receiving a sentence which included a greater period of incarceration than petitioner had received. That would happen unless the court were somehow able to grant a downward departure for the codefendant. As the district court stated at the codefendant's sentencing:

> Well, let me say to both of you, it troubles me that Mr. Yost, unless I do depart for Mr. Fleming, Mr. Yost is ending up with a sentence below what Mr. Fleming is to receive. That troubles me. I – I may need to revise my – at least review the Supreme Court's decision because there are a number of things that they point out or suggest as considerations, and Mr. Beard [the prosecutor] says that he does not think that Mr. Fleming falls within any of those. . . . Because it is troubling me, and if I can depart, what I would like to do is give Mr. Fleming a sentence exactly the same as I gave Mr. Yost. I certainly hate to have Mr. Fleming with a sentence more than Mr. Yost had. But to do that, it requires a departure."

Later, the court further observed:

> I – I think I had indicated my feelings to you that I was not comfortable sentencing Mr. Fleming to more than I had sentenced Mr. Yost. Of course, Mr. Yost received a 5K1 motion and did not go to trial, so there is certainly a basis for that, but I wanted to do some research and see if under the Supreme Court's *Coon* [sic] decision and I think the law that otherwise applies to this Circuit where departures are authorized. And I have not found anything really that would specifically allow me to depart.

The sentencing court was unable to depart downward and the codefendant received a sentence which included a term of imprisonment exceeding that received by petitioner by four months.

The court had expressed its dilemma and it had now come to pass: the codefendant had received a sentence which included a term of imprisonment greater than that received by petitioner, a situation clearly "troubling" to the sentencing court. How did it resolve this troubling dilemma? The court determined that when petitioner was returned to correct the sentence due to the misapplication of U.S.S.G. § 2S1.1, it would not only correct that error but would completely resentence petitioner.

When petitioner appeared before the sentencing court again, a totally new sentencing hearing was conducted, despite the fact that sentence had already been imposed. As the court explained its view concerning why it believed it had the authority to "correct" the sentence:

> So, accordingly, I'm setting aside the sentence I have previously imposed on March 24th, which has not yet become final, both under Rule 35(c) and under the fact that no J and C has been entered, it was expressly retained under this court's jurisdiction to revisit the statute of limitations issue previously identified. So I'm setting aside that sentence. But let me also advise counsel that at this time, I'm also gonna (sic) revisit the application of *United States v. Mueller*, to this case, because I think there are matters that perhaps need to be amplified further with respect to the facts of this case vis-a-vis the Eleventh Circuit's rationale in the *Mueller* decision.

This issue was revisited despite the fact that only three days earlier the court had conducted a painstaking analysis of the precise issue and had made specific factual findings and conclusions of law. Those should have been final since Rule 35(c) " . . . is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guideline . . . [N]or should it be used to reopen issues previously resolved at the sentencing hearing through the exercise of the court's discretion with regard to the application of the sentencing guidelines. Fed. R. Crim. P. 35(c) Advisory Committee Notes (1991 Amendment).

The Eleventh Circuit condoned the court's action. In the face of the overwhelming evidence to the contrary, the court declared, " . . . the district court did not simply change its mind; nor did it simply reconsider its calculations under the appropriate guidelines. Rather, it resentenced Appellant because at the first sentencing hearing it used the wrong guideline, an obvious error. We therefore hold the district court had authority to resentence Appellant pursuant to Rule 35(c)." App. A, 7a (footnote omitted). The Eleventh Circuit completely missed the point. While the district court had the authority under Rule 35(c) to correct its error in using an incorrect guideline, the rule does not give a sentencing court carte blanche to resentence when an error is made.

Despite the plain language of the rule and the Advisory Committee's strong admonition that its use be narrow the court below, in essence, rewrote the rule and broadened its application by holding that " . . . it only takes one clear error to give the district court authority under Rule 35(c) to conduct an entire resentencing at

which the court may correct any other errors, clear or not." App. A, 8a. Without a shred of discussion of whether the court's analysis was correct on the issue of bank fraud as relevant conduct the court below gave free reign to sentencing courts to completely revamp any sentencing if a single, discreet, and easily correctable error is found. The policy implications for such a holding are grave.

In granting to district courts the power to completely resentence defendant when a simple correction of an arithmetical, technical, or other clear error is possible, the Eleventh Circuit has effectively usurped the rulemaking function of this Court by drastically broadening a sentencing court's power. In promulgating Rule 35(c), an exceedingly narrow basis for correcting errors was created in order to afford courts the ability to correct plain errors. As the Advisory Committee Note to the 1991 Amendment makes plain, the rule is not to be used to resentence defendants based upon a change of mind, or its view of the appropriateness of a particular sentence. *See United States v. Layman* 116 F.3d at 109 (modification of sentence due to change of heart by court is impermissible). By affirming petitioner's sentence, the Eleventh Circuit broadened the scope of Rule 35(c) so wide that its original intent will now be unrecognizable. The Court should grant the writ in order to review the misguided decision of the court below.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

STEPHEN R. GLASSROTH, ESQ.
Counsel of Record for Wallace C. Yost

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-2464

D.C. Docket No. 3:97-CR-57/RV

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WALLACE C. YOST, a.k.a.
RODDY LYNN REEVES, etc.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(August 11, 1999)

Before EDMONDSON and BLACK, Circuit Judges, and PAUL*], Senior District Judge.

BLACK, Circuit Judge:

Appellant Wallace C. Yost appeals his sentence for conspiracy to commit mail fraud, wire fraud, and bankruptcy fraud, in violation of 18 U.S.C. § 371, and mail fraud, in violation of 18 U.S.C. § 1341. He asserts the district court erred by resentencing him and revisiting

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* Honorable Maurice M. Paul, Senior U.S. District Judge for the Northern District of Florida, sitting by designation.

issues at the second sentencing hearing that it had previously decided. We hold the district court, having discovered a clear error, had the authority under Rule 35(c) to resentence Appellant and revisit any factual findings or issues previously decided at the initial sentencing and therefore affirm.

I. BACKGROUND

In May 1997, a federal grand jury returned a four-count indictment against Appellant, charging conspiracy to commit bank fraud, mail fraud, wire fraud, money laundering, and bankruptcy fraud, in violation of 18 U.S.C. § 371 (Count I); two counts of bank fraud, in violation of 18 U.S.C. §§ 1344, 2 (Counts II and III); and one count of mail fraud, in violation of 18 U.S.C. §§ 1341, 2 (Count IV).[1] Appellant pled guilty to Count IV and to

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[1] A codefendant, David L. Fleming, was charged in Counts I-III of the indictment. Fleming went to trial, and the jury found him guilty of all counts. Fleming moved for judgment of acquittal and for a new trial. The district court granted his motion for acquittal as to Counts II and III, and as to the bank fraud objective of the conspiracy count, but denied the motion as it related to the remainder of the conspiracy count. The district court also denied Fleming's motion for a new trial. At Fleming's sentencing hearing, the district court found the applicable statute of limitations barred Fleming's (and Appellant's) conviction for conspiracy to commit money laundering The district court found that Fleming's conviction for conspiracy as to the mail fraud and wire fraud objectives was also barred by the applicable statute of limitations. The district court then entered judgment and sentenced Fleming as to the portion of Count I pertaining to conspiracy to commit bankruptcy fraud, the only charge of conviction remaining.

part of Count I; in particular, he pled guilty to the substantive offense of mail fraud and to conspiracy to commit mail fraud, wire fraud, and bankruptcy fraud, but not to conspiracy to commit money laundering or conspiracy to commit bank fraud.

At Appellant's first sentencing hearing on March 24, 1999, the district court, pursuant to U.S.S.G. § 3D1.2(d), grouped together the offenses from Counts I and IV, but erroneously included conspiracy to commit money laundering and conspiracy to bank fraud, to which Appellant had not pled guilty. Pursuant to U.S.S.G. § 3D1.3(b), the district court had to use the highest possible offense level for any of Appellant's offenses as Appellant's base offense level. The district court concluded that Appellant had not committed the offense of conspiracy to commit bank fraud. As a result, the district court determined that Appellant's offense level under U.S.S.G. § 2F1.1, the guideline applicable to the substantive offense of mail fraud and to conspiracy to commit bank fraud, mail fraud, wire fraud, and bankruptcy fraud, would be lower than that calculated by the probation officer. The district court sentenced Appellant under U.S.S.G. § 2S1.1, the guideline applicable to conspiracy to commit money laundering, as it yielded a higher offense level. The district court imposed a sentence of 14 months' imprisonment.[2] When the district court sentenced a codefendant

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Fleming appealed his conviction and sentence for conspiracy to commit bankruptcy fraud, and we affirmed. *See United States v. Fleming*, 11th Cir., 1999, (No. 98-2467, May 5, 1999).

[2] Applying U.S.S.G. § 2S1.1, the resulting adjusted offense level was 17, with a sentencing range of 24-30 months'

on March 26, 1999, it realized it had erred by applying the money laundering guideline in sentencing Appellant. On March 27, 1999, the district court set aside Appellant's initial sentence and held another sentencing hearing.

At the resentencing hearing, the district court recognized that Appellant had not pled guilty to conspiracy to commit money laundering and stated that even if he had pled guilty to that charge, the applicable statute of limitations would have barred his conviction for the offense. The district court therefore sentenced Appellant under U.S.S.G. § 2F1.1. The district court also realized that Appellant had not pled guilty to conspiracy to commit bank fraud either, but reversed its earlier determination and concluded Appellant's conduct did constitute conspiracy to commit bank fraud and therefore could be considered as relevant conduct under § 2F1.1. This conclusion resulted in an increase in Appellant's § 2F1.1 offense level. After its recalculations, the district court sentenced Appellant to 18 months' imprisonment.[3] Appellant brought this appeal, asserting the district court

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imprisonment. After granting the Government's § 5K1.1 motion to reduce the sentence, the court sentenced Appellant to 14 months' imprisonment and ordered him to pay a $10,000 fine and $50,000 restitution.

[3] Based on its redetermination that Appellant's conduct constituted conspiracy to commit bank fraud, the district court recalculated Appellant's adjusted offense level to be 19, for a guideline range of 30 to 37 months' imprisonment. After the § 5K1.1 downward departure, the court sentenced Appellant to 18 months' imprisonment and ordered him to pay restitution in the amount of $1,050,000 (but no fine).

lacked authority under Rule 35(c) to resentence him as it did.

II. ANALYSIS

Rule 35(c) provides that a sentencing court "acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or *other clear error*." Fed.R.Crim.P. 35(c) (emphasis added). In this case, we are asked to determine whether the phrase "other clear error" includes any of the district court's mistakes at the initial sentencing.[4]

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[4] We note the Government could have argued that a sentence is not imposed until the entry of a judgment of conviction. Although the majority of circuits that have addressed the issue view a sentence as being imposed for purposes of Rule 35(c) when it is orally pronounced by the district court, *see United States v. Gonzalez*, 163 F.3d 255, 264 (5th Cir. 1998); *United States v. Layman*, 116 F.3d 105, 108 (4th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1034 (1998); *United States v. Townsend*, 33 F.3d 1230, 1231 (10th Cir. 1994); *United States v. Navarro-Espinosa*, 30 F.3d 1169, 1170 (9th Cir. 1994), the Seventh Circuit has adopted the opposite view. *United States v. Clay*, 37 F.3d 338, 340 (7th Cir. 1994); *see also United States v. Morillo*, 8 F.3d 864, 869 n.8 (1st Cir. 1993) (stating in dicta "it is likely" that when the date of the oral pronouncement differs from the date on which judgment is entered, "sentence is imposed on the date judgment enters, rather than the date sentence is orally pronounced"). In this case, the judgment of conviction was not entered until after the resentencing hearing, so the only sentence shown on that written judgment included the corrections made at the resentencing hearing. If Appellant's sentence was not imposed for purposes of Rule 35(c) until the written judgment was entered, there would be only one sentence – the one pronounced at the resentencing hearing –

We have not specifically delineated the scope of a sentencing court's authority under Rule 35(c). The 1991 Advisory Committee's Note to Rule 35(c) provides:

> The authority to correct a sentence under this subdivision is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action under Rule 35(a). The subdivision is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence. Nor should it be used to reopen issues previously resolved at the sentencing hearing through the exercise of the court's discretion with regard to the application of the sentencing guidelines.

Fed.R.Crim.P. 35 advisory committee's note.

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and the district court would have no need for Rule 35(c) authority. Although Rule 35(c) authority is jurisdictional, see Fed.R.Crim.P. 35 advisory committee's note ("The subdivision [Rule 35(c)] does not provide for any formalized method of bringing the error to the attention of the court and recognizes that the court could sua sponte make the correction."); *United States v. Lopez*, 26 F.3d 512, 522 (5th Cir. 1994) (stating that the seven days from imposition of sentence within which the district court can correct errors is "jurisdictional" under Federal Rule of Criminal Procedure 35(c)), we need not address the question of when Appellant's sentence was imposed for purposes of Rule 35(c) because we hold the district court had authority under Rule 35(c) to resentence Appellant as it did.

Thus, under Rule 35(c), the district court may not simply change its mind, and any error to be corrected under that subsection must be obvious. In this case, the district court did not simply change its mind; nor did it simply reconsider its calculations under the appropriate guidelines. Rather, it resentenced Appellant because at the first sentencing hearing it used the wrong guideline, an obvious error. We therefore hold the district court had authority to resentence Appellant pursuant to Rule 35(c).[5]

Appellant asserts that even if the district court had authority to resentence him, it did not have authority to revisit its prior ruling regarding consideration of Appellant's bank fraud as relevant conduct. In this regard, Appellant argues that the district court's misapplication of this Court's precedent was not a clear error for purposes of Rule 35(c).

"A criminal sentence is a package of sanctions that the district court utilizes to effectuate its sentencing intent consistent with the Sentencing Guidelines." *United States v. Stinson*, 97 F.3d 466, 469 (11th Cir. 1996) (citations omitted). Under this holistic approach, we have held that when we vacate a sentence and remand for resentencing, the sentence becomes void in its entirety and the district court is free to revisit any rulings it made at the initial

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[5] We need not address whether the district court's determination after the initial sentencing hearing that Appellant's conviction for conspiracy to commit money laundering was barred by the applicable statute of limitations constituted a finding of a clear error correctable under Rule 35(c), since Appellant did not plead guilty to and thus was not convicted of that offense in the first place.

sentencing. *See id.* at 469. We see no reason why the same should not be true when the district court resentences under Rule 35(c). *See United States v. Bentley*, 850 F.2d 327, 328-29 (7th Cir. 1988) ("[N]othing but pointless formalism would support a distinction between a sentencing plan disrupted by the vacatur of some counts on appeal and a plan shattered by the district court's own recognition that the plan was infested with error. . . . [W]henever the district court must revise one aspect of the sentencing scheme, it is permitted by Rule 35 to revise the rest."). We thus hold it takes only one clear error to give the district court authority under Rule 35(c) to conduct an entire resentencing at which the court may correct any other errors, clear or not.

III. CONCLUSION

We hold that upon discovering it committed clear error by sentencing Appellant for a crime to which he had not pled guilty, the district court had authority under Rule 35(c) to resentence Appellant as it did.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-2464-EE

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WALLACE C. YOST, a.k.a.
RODDY LYNN REEVES, a.k.a.
KENNETH WAYNE THORNTON,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Florida

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19___, ___F.2d___).

Filed Oct. 14, 1999

Before: EDMONDSON and BLACK, Circuit Judges, and PAUL*, Senior District Judge.

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* Honorable Maurice M. Paul, Senior U.S. District Judge for the Northern District of Florida, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

28 U.S.C. § 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

* * *

RULES OF CRIMINAL PROCEDURE

Rule 35. Correction or Reduction of Sentence

* * *

(c) Correction of Sentence by Sentencing Court. The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error.

* * * *

[p. 63] into account, and in the matter of parity or comparison to the sentence that has been handed down under the guidelines for Mr. Yost.

THE COURT: Well, let me say to both of you, it troubles me that Mr. Yost, unless I do depart for Mr. Fleming, Mr. Yost is ending up with a sentence below what Mr. Fleming is to receive. That troubles me. I – I may need to revise my – at least review the Supreme Court's decision because there are a number of things that they point out or suggest as considerations, and Mr. Beard says that he does not think that Mr. Fleming falls within any of those.

We've been here a long time. Maybe – maybe the best thing for me to do is break for lunch, come back after lunch after I've had a chance to look at that decision. Because It is troubling me, and if I can depart, what I would like to do is give Mr. Fleming a sentence exactly the same as I gave Mr. Yost. I certainly hate to have Mr. Fleming with a sentence more than Mr. Yost had. But to do that, it requires a departure.

Lets – lets break for lunch and we will come back at two o'clock. I don't think I have got anything at two. Do I have anything?

THE CLERK: No, Your Honor.

THE COURT: We will be in recess until two.

MR. BEARD: May it please the court?

* * *

[p. 65] THE COURT: All right. Let me see if there is any further allocution [sic] from the defendant?

THE DEFENDANT: No, sir.

THE COURT: Mr. Beard, anything further from the government?

MR. BEARD: No, Your Honor.

THE COURT: I – I think I had indicated my feelings to you that I was not comfortable sentencing Mr. Fleming to more than I had sentenced Mr. Yost. Of course, Mr. Yost received a 5K1 motion and did not go to trial, so there is certainly a basis for that, but I wanted to do some research and see if under the Supreme Court's *Coon* decision and I think the law that otherwise applies to this circuit where departures are authorized. And I have not found anything really that would specifically allow me to depart. Counsel, do you want to speak to that?

MR. JOHNSON: Nothing more than I have already said, Judge.

THE COURT: Mr. Beard?

MR. BEARD: Your Honor, the *Hoffa* case, which I cited earlier, would suggest that – that a downward departure, because of the fact that Mr. Fleming in all likelihood would be disbarred as a result of a conviction, is not a proper – they call it a prohibited basis within the *Coon* decision. I know – I could not find any other law

* * *

* * *

[p. 3] sentencing I determined that the statute of limitations, insofar as it applied to the proceeds from the sale of the 112 Matamoros Drive property, which is incorporated into the bankruptcy fraud of Count I, occurred more than five years earlier, so that it is outside the scope of the five-year statute of limitations.

Mr. Yost was sentenced on the basis of the proceeds of the 112 Matamoros Drive property being the substantiating basis for the conspiracy to commit money laundering in Count I, which means his sentence has to be completely revisited and set aside. So, accordingly, I'm setting aside the sentence I have previously imposed on March 24th, which has not yet become final, both under Rule 35(c) and under the fact that no J and C has been entered, it was expressly retained under this court's jurisdiction to revisit the statute of limitations issue previously identified.

So I'm setting aside that sentence. But let me also advise counsel that at this time I'm also gonna revisit the application of *United States v. Mueller* to this case, because I think there are matters that perhaps need to be amplified further with respect to the facts of this case vis-a-vis the Eleventh Circuit's rationale in the *Mueller* decision.

So with that, I think you need to be prepared for me to apply the conspiracy to commit bank fraud in this case as

* * *

Supreme Court, U.S.
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No. 99-1170

In the Supreme Court of the United States

WALLACE C. YOST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court in this case acted within its authority under Federal Rule of Criminal Procedure 35(c)—which provides that a district court may correct a sentence "that was imposed as a result of arithmetical, technical, or other clear error" within seven days after the imposition of sentence—when, upon recognizing that it had sentenced petitioner under the wrong Sentencing Guideline, it vacated the sentence, conducted a new sentencing hearing, and revisited a prior ruling concerning the conduct relevant to petitioner's offenses.

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In the Supreme Court of the United States

No. 99-1170

WALLACE C. YOST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 185 F.3d 1178.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1999. A petition for rehearing was denied on October 14, 1999 (Pet. App. 9a-10a). The petition for a writ of certiorari was filed on January 12, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a guilty plea in the United States District Court for the Northern District of Florida, petitioner was convicted on one count of conspiracy to commit

mail fraud, wire fraud, and bankruptcy fraud, in violation of 18 U.S.C. 371, and one count of mail fraud, in violation of 18 U.S.C. 1341 and 2. The district court initially sentenced petitioner to 14 months' imprisonment, to be followed by three years' supervised release, and ordered petitioner to pay a $10,000 fine and $50,000 in restitution. The district court subsequently set aside that sentence and imposed a new sentence, in which petitioner was ordered to serve 18 months' imprisonment, to be followed by three years' supervised release, and was ordered to pay restitution in the amount of $1,050,000 (but no fine). The court of appeals affirmed. Pet. App. 1a-8a.

1. Petitioner was a developer in the Pensacola, Florida, area who owned properties both individually and in corporate names. From 1989 to 1991, petitioner was unable to meet financial obligations as they became due, and creditors began the process of liquidating the security on petitioner's loans. Facing foreclosure actions, petitioner declared bankruptcy and illegally transferred properties in an attempt to protect them from creditors. Eventually, AmSouth Bank obtained three judgments against petitioner totaling $7,300,000, and Citizens and Builders (C&B) Bank obtained two judgments totaling more than $3,525,000. Gov't C.A. Br. 26-34; Presentence Report (PSR) 4-6.

In June 1990, attorneys for C&B Bank took depositions of petitioner and his wife to identify personal assets that might satisfy an outstanding judgment. During his deposition, petitioner did not tell the truth about the existence and location of his personal assets, which frustrated the bank's efforts to collect on the judgment. Gov't C.A. Br. 29-30.

2. In May 1997, a grand jury returned an indictment against petitioner charging him with offenses arising

out of his attempts to conceal assets from creditors in his bankruptcy proceedings. The indictment charged petitioner with one count of conspiracy to commit bank fraud, mail fraud, wire fraud, money laundering, and bankruptcy fraud, in violation of 18 U.S.C. 371 (Count 1); two counts of bank fraud, in violation of 18 U.S.C. 1344 and 2 (Counts 2 and 3); and one count of mail fraud, in violation of 18 U.S.C. 1341 and 2 (Count IV). Two co-defendants, David Fleming and Steven Oppenheim, were also charged in Counts 1-3 of the indictment. See C.A. Rec. Ex. 1-23.

Petitioner entered into a plea and cooperation agreement with the government. He eventually pleaded guilty to conspiracy to commit mail fraud, wire fraud, and bankruptcy fraud (part of Count 1) and to mail fraud (Count 4). His guilty plea to the conspiracy count, however, did not include a guilty plea to conspiracy to commit money laundering or bank fraud. Pet. App. 2a-3a.

On March 24, 1999, the district court held a sentencing hearing. At that sentencing hearing, the district court grouped petitioner's offenses in Counts 1 and 4, pursuant to Sentencing Guidelines § 3D1.2(d), to determine petitioner's offense level. In so doing, however, the district court erroneously included under the conspiracy count the offenses of conspiracy to commit money laundering and conspiracy to commit bank fraud, to which petitioner had not pleaded guilty. Pet. App. 3a.

Under Guidelines § 3D1.3(b), which governs the offense level applicable to groups of closely related counts, the district court was required to impose a sentence based on the greatest offense level for any of petitioner's offenses. The applicable Sentencing Guideline for fraud offenses, including conspiracy to commit

bank fraud, mail fraud, wire fraud, and bankruptcy fraud, is Guidelines § 2F1.1. The applicable Guideline for conspiracy to commit money laundering is Guidelines § 2S1.1. In determining petitioner's offense level under the fraud Guideline, Section 2F1.1, the district court concluded, based on *United States* v. *Mueller*, 74 F.3d 1152, 1159-1160 (11th Cir. 1996), that petitioner had not committed the offense of bank fraud in giving incomplete testimony at his deposition, and therefore declined to consider that conduct as part of petitioner's relevant conduct.[1] The court then determined that the money laundering Guideline, Section 2S1.1, would yield a higher offense level than the fraud Guideline. Accordingly, it applied Section 2S1.1, which yielded an adjusted offense level of 17 and a sentencing range of 24-30 months' imprisonment. The court also granted the government's motion for a downward departure pursuant to Guidelines § 5K1.1 based on petitioner's cooperation. The court then sentenced petitioner to 14 months' imprisonment and ordered him to pay a $10,000 fine and $50,000 in restitution.

3. When the district court sentenced co-defendant Fleming two days later, on March 26, 1999, it realized that it had erred in petitioner's sentencing by applying the money laundering Guideline, Section 2S1.1, since petitioner had not pleaded guilty to conspiracy to engage in money laundering. The next day, the district court vacated petitioner's sentence pursuant to Federal Rule of Criminal Procedure 35(c) and conducted a new sentencing hearing. Pet. App. 15a. Rule 35(c) provides that a district court, "within 7 days after the imposition

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[1] *Mueller* held that a defendant's filing of a misleading answer and affidavit in a civil suit did not constitute a violation of the criminal bank fraud statute, 18 U.S.C. 1344.

of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, *or other clear error*." Fed. R. Crim. P. 35(c) (emphasis added).

At the new sentencing hearing, the district court observed that it had improperly applied the money laundering Guideline to petitioner because petitioner had not pleaded guilty to conspiracy to engage in money laundering. The court also ruled that the money laundering Guideline would not be applicable to petitioner in any event because the statute of limitations would have barred a conviction for money laundering. Pet. App. 15a. The court therefore resentenced petitioner under the fraud Guideline, Section 2F1.1.

In correcting its error and imposing a new sentence, the district court also reexamined its earlier determination that petitioner's conduct did not constitute bank fraud under the Eleventh Circuit's decision in *Mueller*, *supra*. The court concluded that petitioner's conduct did in fact constitute conspiracy to commit bank fraud and therefore should be considered as part of the relevant conduct in sentencing petitioner under the fraud Guideline. The court then recalculated petitioner's offense level under the fraud Guideline. That recalculation resulted in an adjusted offense level of 19, for a Guidelines sentencing range of 30-37 months' imprisonment. After again granting the government's motion for downward departure, the court sentenced petitioner to 18 months' imprisonment, and ordered petitioner to pay restitution in the amount of $1,050,000. Pet. App. 4a & n.3.

4. Petitioner appealed, arguing that, when the district court acted under Rule 35(c) to correct its error in sentencing him based on the money laundering Guideline, it had no authority also to reexamine its earlier decision that petitioner had not engaged in conspiracy

to commit bank fraud and to recalculate his offense level under the fraud Guideline based on that reexamination.[2] The court of appeals affirmed. Pet. App. 1a-8a. The court concluded that the district court had authority under Rule 35(c) to resentence petitioner, because it had made a "clear error" in sentencing petitioner under the money laundering Guideline. See Pet. App. 6a-7a. Given that the district court had that authority to resentence petitioner, the court held that it also had the authority to revisit prior rulings that were

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[2] Rule 35(c) provides that a court may correct a sentence based on clear error "within 7 days after the imposition of sentence." It does not, however, expressly define "the imposition of sentence" or address whether a district court may reexamine determinations affecting sentencing before "the imposition of sentence." In this case, the district court conducted the second sentencing hearing within seven days of its initial sentencing hearing, but before it had entered any written imposition of sentence or entered judgment. Because the second sentencing hearing occurred after the first oral sentence was pronounced but before the judgment of conviction was entered, the question arose whether the district court had initially imposed a sentence on petitioner. If no sentence had been imposed before the second sentencing hearing, then the district court's authority to reexamine its determinations might not be constrained by Rule 35(c). The court of appeals observed that other circuits are in disagreement as to whether the oral pronouncement of sentence after a hearing constitutes "the imposition of sentence" under Rule 35(c). See Pet. App. 5a n.4. It found no need to resolve that issue in this case, however, because it determined that the district court did have authority to reexamine its earlier determination as to whether petitioner's conduct constituted conspiracy to commit bank fraud when it corrected the sentence based on its error in applying the money laundering Guideline. *Id.* at 6a. The Eleventh Circuit has since ruled that the "seven-day period set out in Rule 35(c) begins to run when the sentence in a case is orally imposed." *United States* v. *Morrison*, 204 F.3d 1091, 1094 (11th Cir. 2000).

reflected in its original sentence. The court noted that it had taken a "holistic approach" to criminal sentences reviewed on appeal, under which a sentence that is vacated for error and remanded to the lower court "becomes void in its entirety and the district court is free to revisit any rulings it made at the initial sentencing." *Id.* at 7a-8a. The court saw "no reason why the same should not be true when the district court resentences under Rule 35(c)." *Id.* at 8a. Accordingly, it held that "it takes only one clear error to give the district court authority under Rule 35(c) to conduct an entire resentencing at which the court may correct any other errors, clear or not." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 6-13) that when the district court acted under Federal Rule of Criminal Procedure 35(c) to correct his sentence, the court lacked authority to reexamine its earlier determination that petitioner had not engaged in conspiracy to commit bank fraud. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Rule 35(c) provides that the district court, "acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error." Rule 35(c) therefore limits the reasons for which a district court may move in the first instance to correct a sentence; the court may do so only if it discovers some "arithmetical, technical, or other clear error" in the sentence. Rule 35(c) does not, however, limit the district court's authority to correct a defendant's sentence once it discovers the existence of an arithmetical, technical, or

clear error that influenced the sentence. Thus, although under Rule 35(c) the district court may not correct a sentence in the absence of an arithmetical, technical, or clear error, once it discovers the existence of such an error, it may then correct any other error in the sentence, even if that other mistake by itself would not have warranted reopening the sentence.[3] As the Seventh Circuit has explained: "[W]henever the district court must revise one aspect of the sentencing scheme, it is permitted by Rule 35 to revise the rest. The district court may act without waiting for instructions or permission." *United States* v. *Bentley*, 850 F.2d 327, 329, cert. denied, 488 U.S. 970 (1988).

In this case, the district court initially erred in applying the money laundering Guideline rather than the fraud Guideline to determine petitioner's sentence. Once the district court recognized its error, it moved to correct petitioner's sentence. At that point it was free to correct other errors that had influenced its initial determination of petitioner's sentence.

Petitioner correctly observes (Pet. 7-8) that Rule 35(c) does not provide the district court with the authority to correct a sentence merely because the court changes its mind about the appropriateness of a sentence. See Fed. R. Crim. P. 35 advisory committee note (1991); *United States* v. *Layman*, 116 F.3d 105, 107-109 (4th Cir. 1997), cert. denied, 522 U.S. 1107 (1998); *United States* v. *DeMartino*, 112 F.3d 75, 80-81 (2d Cir. 1997). That is not what occurred in this case,

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[3] In this Court, petitioner does not dispute that the district court acted properly to resentence him under the fraud Guideline, because application of the money laundering Guideline was "arithmetical, technical, or other clear error" within the meaning of Rule 35(c).

however; here, the district court was empowered to correct the sentence because it resulted from a clear error, and in doing so it was not precluded from also correcting other errors influencing the sentence. This is not a case, therefore, where "the district court unequivocally states a sentence and then imposes it, and the sentence is not the product of error." *United States* v. *Fraley*, 988 F.2d 4, 7 (4th Cir. 1993).

2. The decision below does not conflict with the decision of any other court of appeals. Petitioner suggests that the decision below conflicts with the *Layman*, *DeMartino*, and *Fraley* decisions, but as discussed above, those cases involved situations where the initial sentence imposed by the district court contained no error of any kind, much less clear error, and therefore the resentencing simply reflected a change of heart on the part of the district court about the appropriate sentence.

In *United States* v. *Portin*, 20 F.3d 1028 (9th Cir. 1994), the court held that, when a district court acts pursuant to Rule 35(c) to correct the term of imprisonment imposed on a defendant, it may not use that authority also to alter a separate part of the sentence (in that case, a fine). In *Portin*, the district court rejected plea agreements the parties had negotiated under Federal Rule of Criminal Procedure 11(e)(1)(C) and did not allow the defendants to withdraw their guilty pleas, as required under that Rule; instead, the district court sentenced both defendants to more prison time than the amount to which they had agreed in the plea agreements and also fined both defendants. The district court later acknowledged its error in failing to allow the defendants to withdraw their guilty pleas and corrected the defendants' sentence of imprisonment pursuant to Rule 35(c), but it also increased the fines it

previously had imposed. The Ninth Circuit ruled that the district court exceeded its authority under Rule 35(c) by increasing the fines because there was no error as to the fines and all the issues with respect to fines had been resolved at the initial sentencing hearing. *Ibid.* The court followed its prior decisions holding that when "a sentence [is] composed of legal and illegal 'portions,' * * * [and] the illegal part [can] be cleanly 'lopped off,'" *id.* at 1030, a district court may act under Rule 35 only to correct the illegal part of the sentence.

This case is distinguishable from *Portin* because the district court's error at the initial sentencing did not yield an illegal part of the sentence that could be cleanly "lopped off" from the rest of the sentence. Rather, the district court's error was its use of an improper Sentencing Guideline to determine petitioner's sentence. Because the district court used the wrong Guideline, all aspects of petitioner's sentence required correction through use of a different Guideline. When the district court then applied the proper Guideline to determine petitioner's sentence, it was entitled to make a correct, not an erroneous, sentencing determination under that Guideline. That determination necessarily involved a calculation of the loss and amount of applicable fines and restitution to be paid.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2000